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No. 06-740

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

YUMAN LOPEZ-CANCINOS, and
YOCARI CASTILLO DE LOPEZ,

Petitioners,

—v.—

ALBERTO R. GONZALES,
United States Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

In light of the Ninth Circuit's recent decision in *Ramadan v. Gonzales*, __ F. 3d __, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007) (*"Ramadan II"*), reversing its interpretation of law in the very case cited below as the basis for denying the petition for review, this Court should issue an order granting *certiorari*, vacating the decision below, and remanding the case ("GVR") for further review. This case meets the criteria for GVR in that the lower court's decision rests on a legal proposition that the same court has since rejected, and review of this case by that court in light of its new precedent is therefore likely to affect the ultimate outcome of the case. The government's speculation that the panel below must have accurately predicted the *Ramadan* panel's decision at the time it denied the petition for rehearing in this case is unwarranted. Moreover, given that the decision in *Ramadan II* regarding the scope of federal court jurisdiction cannot be reconciled with the decision below, the government's claim that the focus of Petitioner's arguments regarding jurisdiction differ from those set forth in the Petition for Writ of Certiorari are beside the point: in light of intervening precedent, the Court's exercise of its GVR power here is the fairest, most expedient, and most appropriate manner in which to resolve this case.

BACKGROUND AND INTERVENING PRECEDENT

As set forth more fully in the Petition for Writ of Certiorari, this case raises the issue of the meaning of the term "questions of law" in 8 U.S.C. §1252(D), which provides that, notwithstanding other jurisdictional bars set forth in the Immigration and Nationality Act, 8 U.S.C. §1101 et seq., federal courts retain jurisdiction over "questions of law." In *Ramadan v. Gonzales*, 427 F. 3d 1218, 1222 (9th Cir. 2005) (*"Ramadan I"*), opinion withdrawn on rehearing in *Ramadan II*, the Ninth Circuit had held that the phrase

"questions of law" "refer[red] to a narrow category of issues regarding statutory construction." In its decision in the case at bar, the circuit court cited only *Ramadan I* and the jurisdictional provision itself in support of its finding that it lacked jurisdiction to review Mr. Lopez-Cancinos' applications for asylum and voluntary departure. *Petition for Writ of Certiorari,* Appendix, p. 3a. Based on its holding in *Ramadan I,* the Ninth Circuit found that it lacked jurisdiction to consider 1) the argument that Mr. Lopez-Cancinos' mental health disorder compromised his ability to comply with the one-year filing deadline, and qualified him for an exception to the deadline under 8 U.S.C. § 1158 (a)(2)(D) (exception based on changed or extraordinary circumstances) and 8 C.F.R. § 208.4(a)(5)(i) (extraordinary circumstances include serious mental disability); and 2) the argument that certain false statements Mr. Lopez-Cancinos had made did not constitute "false testimony for the purpose of obtaining," immigration benefits, *see* 8 U.S.C. §1101(f)(6) (such testimony bars a finding of "good moral character"), and thus did not bar him from eligibility for voluntary departure under 8 U.S.C. §1229c(b).

The Petition for Writ of Certiorari in this case was filed on November 21, 2006. On February 22, 2007, following rehearing in *Ramadan,* the Ninth Circuit withdrew its original opinion and issued a new one. *Ramadan v. Gonzales,* 2007 WL 528715 (9th Cir.) (*"Ramadan II"*). In so doing, the court modified its interpretation of the term "questions of law" to include the application of statutes or regulations to undisputed facts. It stated:

> By implying a fixed dichotomy between fact and law, our brief initial opinion inadvertently failed to consider an important category of cases – those that raise mixed questions of law and fact.

Id., 2007 WL 528715, *1. The court held that Ramadan's claim that the facts in her case established "changed circumstances" so as to qualify her for an exception to the one-year asylum application filing deadline constituted a question of law over which it had jurisdiction.

GVR IS APPROPRIATE IN THIS CASE

Granting certiorari, vacating, and remanding this case is appropriate because of the likelihood that the intervening circuit court precedent, once considered by the court below, would change the outcome of the litigation, and because the factors cautioning against GVR in certain cases are absent here. Title 28 U.S.C. § 2106 confers broad powers on the Supreme Court to vacate any judgment lawfully before it for review and to remand the cause for such action as may be fair under the circumstances. *Lawrence v. Chater,* 516 U.S. 163, 166 (1996).[1] This Court has stated:

> Where intervening developments [...] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. Whether a GVR

[1] The statute reads, in full, "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. §2106.

> order is ultimately appropriate depends further on the equities of the case.

Id. at 167-68. As shown below, the "reasonable probability" of a different outcome and the equities in this case align to render a GVR the most appropriate resolution. The government's arguments against GVR amount to unwarranted speculation and fail to address the Court's criteria for GVR orders.

Reconsideration of this Case in Light of *Ramadan II* Will Likely Result in a Different Outcome With Respect to the Issue of the Federal Court's Jurisdiction.

First, there is a reasonable probability of a different outcome in light of the recent decision in *Ramadan II*. In that case, the court found that it had jurisdiction to review the applicant's claim that her public expression of political opinions since her arrival in the U.S. from Egypt constituted changed circumstances materially affecting her eligibility for asylum, so as to qualify her for an exception to the one-year filing deadline. *Ramadan II*, 2007 WL 528715 (9th Cir.) at *2-3. There is no readily apparent material distinction between the nature of that claim and the Petitioners' claim here that the effect of Mr. Lopez-Cancinos' mental disorder on his ability to timely file for asylum constitutes an extraordinary circumstance relating to his filing delay. Indeed, the government, in it brief, offers none. There is thus every reason to believe that, applying its new interpretation of law to the facts of this case, the Ninth Circuit would likewise find that it had jurisdiction to review Mr. Lopez-Cancinos' claim to asylum eligibility.

The Argument That The Ninth Circuit Should Not Have the Opportunity to Reconsider Its Decision Below Because it Must Have Anticipated the *Ramadan II* Holding When it Decided this Case Amounts to Unwarranted Speculation.

The government's argument against a GVR order amounts to unwarranted speculation as to the Ninth Circuit's reasoning in denying the petition for rehearing below. The government argues that because the Ninth Circuit had granted the petition for rehearing in *Ramadan I* at the time it denied the petition for rehearing in this case, the court "presumably determined that its conclusion that it lacked jurisdiction to review the denial of petitioner's application for asylum would be unaffected by the court's grant of rehearing in *Ramadan* or by the ultimate resolution on that case on rehearing." *Brief for the Respondent in Opposition* ("*Opposition Brief*"), p. 11. Yet the order denying the petition for rehearing is silent as to the court's reasoning. *Petition for Writ of Certiorari*, App. 1a. In addition, not only was *Ramadan II* not decided until six months after the denial of the petition for rehearing below, but, as the government emphasizes, Petitioners had argued before the panel that the agency's failure to consider the mental health/exception circumstances argument amounted to a due process violation, the review of which clearly falls within the federal courts' jurisdiction. *Opposition Brief*, p. 9, n. 2. There is therefore no reason to believe that the court gave the issue of its jurisdiction over mixed questions of law and fact full, or even cursory, consideration in this case. One can only speculate as to what resolution the panel expected in *Ramadan II*, and such speculation would be unwarranted.[2] Ultimately, a court

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[2] Again, the argument against a presumption that the panel anticipated the holding in *Ramadan II* when it denied the petition for reconsideration here is strengthened by the fact that there is no readily apparent distinction between the "changed circumstances"

cannot be presumed to have anticipated and considered an opinion it had not yet rendered.

The equities also warrant GVR here. This Court has stated that, in an appropriate case, a GVR order not only "conserves the scarce resources [...] that might otherwise be expended on plenary consideration," and "assists the court below by flagging a particular issue that it does not appear to have fully considered," but it also "alleviates the '[p]otential for unequal treatment' that is inherent in [the Supreme Court's] ability to grant plenary review of all pending cases raising similar issues." *Lawrence v. Chater,* 516 U.S. at 606-607 (internal citations omitted). Not only is it clear in this case that the Ninth Circuit did not consider the question of its jurisdiction over the application of the law to undisputed facts, but the need to alleviate the potential for unequal treatment could hardly be greater than in a case where the same legal issue that was resolved in a lower court against a petitioner before this Court has since been resolved in favor of another petitioner by the same lower court.

GVR is Warranted Here Given the Absence of Factors Cautioning Against Its Use and The Strong Equities In Favor of Allowing the Ninth Circuit to Address the Legal Questions Raised in This Case.

The factors cautioning against a GVR order in certain cases are absent in this one. Indeed, the government concedes that if this Court "concludes that the court of appeals should explicitly consider whether its revised approach in *Ramadan* would bear on that court's resolution of this case, this Court may wish to consider" GVR "to permit the court to undertake that inquiry." *Opposition Brief,* p. 11. The parties thus agree

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question raised in that case and the "exceptional circumstances" question raised here.

that there is no downside to providing the Ninth Circuit with this opportunity. The equities also counsel in favor of such an action.

This is not a case in which the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court. *See Lawrence v. Chater,* 516 U.S. 168 (1996) (GVR is unwarranted under such circumstances).[3] Here, the potential benefits to the Petitioners clearly justify a delay to enable the Ninth Circuit to apply its own precedent to the case because a finding of jurisdiction over the filing deadline issue could lead to an adjudication of Mr. Lopez-Cancinos' asylum claim on the merits.[4] This Court's solicitude for the rights of criminal defendants in light of the government's coercive power to imprison, *see Stutson v. United States,* 516 U.S. 193, 196 (1996), and its inclination to issue GVR orders in light of intervening developments in criminal cases counsel in favor of the same approach where the governmental power involved is the power to remove an individual from the country to one where he claims he will face persecution (and in this case, possibly death). Because he was deemed ineligible for asylum, and because that determination was deemed unreviewable before *Ramadan II,* no federal court has ever considered Mr. Lopez-Cancinos' claims that he has a well-founded fear of persecution, or that, in light of his past persecution, he is entitled to asylum on humanitarian grounds. *See* 8 C.F.R. § 208.13(b)(1)(iii) (eligibility for victims of past persecution based on the severity of the

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[3] The Court in *Lawrence v. Chater* also set forth another factor counseling against GVR: whether the intervening development is a confession of error that is part of an unfair or manipulative litigation strategy. That factor is not at issue here.

[4] Ms. Castillo de Lopez would also benefit as a derivative asylum applicant.

persecution or the possibility of other serious harm). The equities therefore weigh in favor of a GVR in this case.

CONCLUSION

For the reasons stated above, the Court should grant *certiorari*, vacate the decision below, and remand the case for consideration in light of the recent decision in *Ramadan v. Gonzales.*

Respectfully Submitted,

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